

LAW OFFICES OF RICHARD S. MYERS

1030 15TH STREET, N.W., SUITE 908
WASHINGTON, D.C. 20005
(202) 371-0789
TELECOPIER (202) 371-1136

Richard S. Myers
Sean P. Beatty+
Jay N. Lazrus*
Lori B. Wasserman*

Communications Engineer:
James J. Keller

DOCKET FILE COPY ORIGINAL

+ Also admitted to California
* Admitted to Maryland only

February 17, 1995

Mr. William Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RECEIVED
FEB 17 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

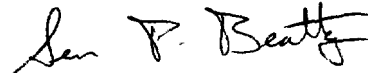
Re: WT Docket No. 94-148

Dear Mr. Caton:

On behalf of WinComm, Inc., enclosed for filing are an original and four copies of comments in the above referenced docket. Please stamp the file copy and return it to our courier.

If you have any questions regarding the foregoing, please contact the undersigned.

Very truly yours,



Sean P. Beatty

Enclosures

No. of Copies rec'd
List A B C D E

024

ORIGINAL

RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEB 17 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Reorganization and Revision of)
Parts 1, 2, 21, and 94 of)
the Rules to Establish a New)
Part 101 Governing Terrestrial)
Microwave Fixed Radio Services)

WT Docket No. 94-148

DOCKET FILE COPY ORIGINAL

To: The Commission

COMMENTS OF WINCOMM, INC.

WinComm, Inc., by its attorneys, respectfully submits these comments in response to the Notice of Proposed Rulemaking in the above captioned proceeding.¹

The primary objective of this NPRM is to consolidate and conform rules pertaining to the microwave service found primarily in Parts 21 and 94. In addition to consolidating these rules into a new Part 101, the Commission has also proposed additions to its rules which memorialize certain interpretations developed by its staff over the years. WinComm's comments focus entirely on these proposed additions.

I. BACKGROUND

WinComm is developing a nationwide network of Multiple Address System ("MAS") frequencies for the purpose of providing a communications private carrier service to retailers requiring point of sale data transfer and to banks requiring Automated Teller Machine data transfer. MAS frequencies permit fixed point to multipoint communications,

¹ Notice of Proposed Rulemaking, WT Docket No. 94-148, released December 28, 1994 ("NPRM").

and thus provide an efficient wireless medium for such services at a relatively low cost.

II. TIME IN WHICH STATION MUST BE PLACED IN OPERATION

In Paragraph 13 of the NPRM, the Commission outlines an addition to its rules to prevent an abuse of its construction period requirement. An example of the abuse is as follows: The Commission grants a license for an MAS station under Call Sign A. The construction period begins running from the date of issue. Nine months after the license is issued, the same licensee files an application for a new station located five miles from the Call Sign A station on the same frequency. Three months later, the second application is granted under Call Sign B. Licensee allows Call Sign A to automatically lapse for failure to construct, but now has an additional year to build a station under Call Sign B on the same frequency. In effect, licensee has created a two year construction period. This process could go on indefinitely, extending the construction period as long as licensee saw fit. WinComm agrees with the Commission that its rules should be revised to make it clear that the construction period cannot be circumvented through these kinds of subsequent filings.

Instead of issuing a rule to remedy this abuse, the Commission's staff has taken measures on its own to ensure that the Commission's rules are not circumvented. For instance, the staff, in its discretion, has required a certification of construction before it will grant a new

application filed by a licensee located near its existing license on the same frequency. However, WinComm contends that this discretion, which is vulnerable to uneven application, should be eliminated in favor of a certification requirement for all applicants. It is appropriate to level the playing field for all applicants by requiring each to make the same certification.

Based on these concerns, WinComm has identified the following shortcomings associated with Proposed Rule 101.63. First, the proposed rule does not adequately clarify the fact that granted modification applications do not extend the initial construction period. Second, the proposed rule only addresses abuses related to modifications to existing licenses. As described above, the real problem pertains to the filing of applications for new stations, which the proposed rule does not address.

Accordingly, WinComm submits the following changes to Proposed Rule 101.63(a), the portion of the proposed rule pertaining to these issues, to remedy these shortcomings: (Changes are noted with underlined text):

(a) Except as provided in paragraphs (b) and (f) of this section, each station authorized under this part must be in operation within 12 months from the initial date of grant. A granted modification application pertaining to the station will not extend this 12 month period. Modification of an operational station must be completed within 12 months of the date of grant of the applicable modification request. An application for a new station within 90 miles and on the same frequency as a station or stations licensed to the applicant must contain a certification that at least one of those stations has been constructed.

With WinComm's changes, the proposed rule explicitly provides that a modification to an existing license will not extend the original construction period. The second addition closes the "new station" loophole used to circumvent the Commission's construction period rule. The language in the second addition also recognizes that, due to coverage or capacity issues, multiple stations in the same area on the same frequency might be required. Those licensees requiring multiple facilities on the same frequency in the same area will be somewhat constrained by this proposed language. However, once the licensee builds one station, the constraint disappears. Accordingly, the proposed language balances the need for strict enforcement of the construction period and the needs of licensees requiring multiple stations to adequately service its customers in a particular area.

III. DEFINITION OF "OPERATION"

The Commission's current rules provide that, ". . . a station authorized under this part must be in operation within 12 months from the date of grant" 47 C.F.R. § 94.51(a). As the NPRM explains, there has been some issue as to what constitutes "operation" for the purpose of complying with this rule. See NPRM, ¶ 14. The staff has taken the position that "operation" really means "the transmission of operational signals". See Id. It is WinComm's position that this definition reflects an outmoded view of the types of services offered by the Commission's licensees, and that the

definition is overly restrictive to those licensees offering communications services to others.

This viewpoint is supported by WinComm's experience with constructing systems using MAS authorizations. Available MAS frequencies are scarce in major metropolitan markets. The primary source of MAS frequencies in these areas are frequencies reclaimed by the Commission and placed on Public Notice under a filing window. The typical Public Notice provides thirty days notice before the filing window opens. To ensure the optimum chance of securing the frequency, applications must be filed on the first day of the filing window. Filing on the first day does not guarantee that an applicant will obtain the license, because all applications filed on the same day are mutually exclusive. In the last several years, WinComm is not aware of any instance where mutually exclusive MAS applications have been resolved. Applying for MAS spectrum under these circumstances is unpredictable at best. Given this unpredictability, the rational entrepreneur will not spend a great amount of resources planning the construction of a facility until the license is actually granted.

The type of service that WinComm's network will offer, i.e., a communications private carrier service to others, presents a further issue. The network requires subscribers for operational traffic. However, it is difficult to convince a subscriber to use a network without a prototype in place to

demonstrate. Herein lies the primary difficulty in the Commission's requirement that a constructed facility must transmit operational traffic. In WinComm's case, operational traffic requires customers, yet there is no guarantee that it can sign on customers within the one year construction period imposed on MAS licenses. Given the unpredictability of the initial licensing process, the delay associated with securing the site after a license is granted, and the delay associated with filing a modification application and waiting for its grant should the station's operating parameters differ from those granted in the license, a significant portion of the one year construction period disappears before a prospective customer can be approached. In addition, a licensee can expend a significant amount of money purchasing transmitter and antenna equipment, arranging for the necessary communications links to the master station, and entering into multi-year antenna site leases (the industry standard is to require a two to three year commitment before an antenna site manager will consider placing equipment on the tower or building), to be left with a small window of time to secure customers for the system. If the licensee does not locate those customers, the license terminates automatically for failure to have operational traffic, resulting in a significant loss of time and money. Under these circumstances, the one year construction deadline is too short to develop "operational" traffic involving new types of

subscriber based services.

Instead, the Commission's rules should encourage investment in new communications technologies and uses. Of course, WinComm also recognizes the Commission's concern regarding spectrum warehousing. However, the balanced approach to addressing this concern is not to impose a stringent requirement of operational traffic on all microwave licensees. WinComm offers the three following alternatives to the Commission's approach.

First, the Commission could maintain its one year construction requirement. For purposes of this requirement, the Commission would use a "capability" standard, i.e., the station is capable of transmitting a signal. The Commission would then issue a new rule addressing operational traffic. The new rule would provide that the station must transmit operational traffic within two years of the original grant date or the license automatically terminates.

Second, the Commission could retain its definition of "operation", but extend the construction period. Consistent with the first alternative, the new construction period would be two years.

Finally, the Commission could recognize a distinction between licensees providing private carrier communications services to others and those licensees who will simply use the frequency for their own internal uses. Internal use licensees do not have the same difficulty securing operational traffic

for their systems. Accordingly, the Commission could issue a rule that extends the construction period to two years for those licensees providing private carrier communications services to others, while maintaining a one year construction period for all other microwave licensees.

At the very minimum, WinComm requests the Commission to issue a rule permitting extended construction periods for stations under Part 101. Such a rule could be modelled on the extended implementation rule for Specialized Mobile Radio Systems contained in Section 90.629 of the Commission's rules. In such a rule, the Commission would permit extended construction periods upon an adequate justification.

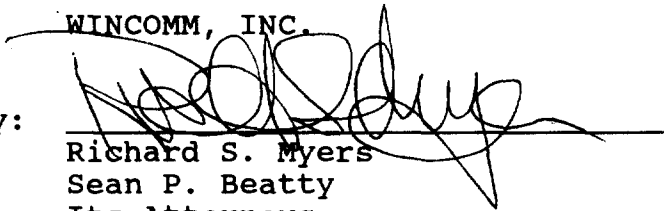
IV. CONCLUSION

Based on the foregoing, WinComm recommends additions to the proposed rule pertaining to the time in which a station must be placed in operation and urges the Commission to re-evaluate its definition of "operation" for purposes of its construction requirements.

Respectfully submitted,

WINCOMM, INC.

By:


Richard S. Myers
Sean P. Beatty
Its Attorneys

Law Offices of Richard S. Myers
1030 15th Street, NW, Suite 908
Washington, DC 20005
(202) 371-0789

February 17, 1995